



U.S. Department  
of Transportation

Urban Mass  
Transportation  
Administration

# CIRCULAR

UMTA C 4220.1B

May 5, 1988

Subject: THIRD PARTY CONTRACTING GUIDELINES

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1. PURPOSE. This circular revises the Urban Mass Transportation Administration's (UMTA's) Third Party Contracting Guidelines to provide current guidance for grantees and makes UMTA requirements consistent with the goals and spirit of Executive Order 12612, Federalism.
2. CANCELLATION. UMTA Circular 4220.1A, "Third Party Contracting Guidelines," dated 6-8-82.
3. REFERENCES.
  - a. Urban Mass Transportation (UMT) Act of 1964, as amended, 49 USC sec. 1601 et seq.
  - b. 49 CFR Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
  - c. Executive Order 12612, "Federalism," dated 10-26-87.
  - d. DOT Order 4600.9B, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments," dated 11-15-83.
  - e. UMTA Circular 5010.1A, "Urban Mass Transportation Administration Project Management Guidelines," dated 9-18-87.
  - f. UMTA Circular 7010.1, "Capital Cost of Contracting," dated 12-5-86.
4. APPLICABILITY. This circular applies to all UMTA grantees and subgrantees that contract with outside sources under UMTA grant assistance programs. For grantees receiving UMTA operating assistance, the provisions of this circular apply to all procurements undertaken in support of such grantees' mass transportation operations. The circular requirements relating to: procurement requirements and standards, Chapter I; preaward review, Chapter III; and bid protests, Chapter V, do not apply to procurements undertaken in support of a capital project that a grantee accomplishes entirely without UMTA financial assistance.

5. BACKGROUND. UMTA Circular 4220.1A, released on June 8, 1982, has been in effect for over five years. While grantees and UMTA have found the document effective and useful, various changes in the UMT Act, the President's Federalism Executive Order 12612, the new uniform rule on administrative requirements for grants, 49 CFR part 18, (the common grant regulation) and experience with the circular indicate that a revision is now necessary. This revision provides a new structure for the guidelines and makes significant substantive changes in several areas.
- a. UMTA's Role in Grantee Procurement. For several reasons, a less intrusive Federal role in grantees' procurement activities would be appropriate in the future. This conclusion is based fundamentally upon constitutional principles of Federalism as reemphasized by the President's Federalism Executive Order and embodied in the new common grant regulation. The Executive Order requires Federal agencies to strictly adhere to constitutional principles and assure constitutional authority for any policy implementation that might have Federalism implications. Specifically, the Executive Order directs that Federal agencies not substitute their judgment for that of the recipient, unless the matter is primarily a Federal concern and that agencies, to the maximum extent feasible, defer to the States to establish standards rather than setting national standards. See Executive Order 12612, Section 3(d)(2). Similarly, the common grant regulation requires States to follow their own state procurement law.

Also, consistent with Federalism principles, the UMTA program has evolved to one that in many instances allocates primary responsibility for compliance with many Federal requirements to State and local grantees. For example, the UMT Act section 9 formula grant program requires grantees to certify compliance with various provisions rather than relying on UMTA pre-grant review. UMTA's role in that program is primarily one of periodic, post-grant review to assure that grantees do, in fact, comply with these requirements. Relating to procurement, section 9(e)(3)(E) of the UMT Act requires grantees to certify that they will use competitive procurements and will not use procurements with exclusionary or discriminatory specifications.

Thus, this circular reduces UMTA's preaward involvement in grantees' procurements, while ensuring that such procurements comply with Federal requirements and standards. It also reiterates

UMTA's discretion to take various actions to ensure compliance when needed. The circular adds a new self-certification process, reduces preaward review of procurements, expressly preserves UMTA's broad discretion in reviewing grantee procurement systems, and greatly limits review of bid protests. These provisions are described below.

- b. Grantee Self-Certification. The new self-certification process, detailed in Chapter II, is similar to the former "Letter of Assurance" procedure, but requires some documentation and allows grantees greater flexibility in contracting. The process provides that, upon a grantee's self-certification, UMTA will only routinely preaward review the grantee's sole source justification for procurements which exceed one million dollars, and single bids involving procurement of fourteen or more buses.

All grantees may self-certify, by following the procedure set forth in Chapter II, but grantees of greater than 100 revenue vehicles must self-certify within one year of the effective date of this circular. This certification is designed to assure UMTA that a grantee does, in fact, have the technical capacity, per Section 3(c) and Section 9 of the UMT Act, to carry out UMTA-assisted projects by certifying that it complies with applicable Federal procurement requirements and standards. To ensure that the grantee has the required procedures, has examined its procurement system prior to certification, and to assist UMTA in its triennial review and other oversight capacities, Chapter II requires that a grantee briefly summarize required procurement procedures in the certification form.

- c. UMTA preaward review of third party contracts. In some instances and with appropriate safeguards, eliminating preaward review would not jeopardize compliance with Federal requirements and standards. Reducing UMTA's role alleviates grantees' paperwork burdens and delays grantees have sometimes experienced from the review process.

Thus, grantees that have self-certified must submit only sole source procurements that exceed one million dollars and single bids for procurement of 14 or more buses to UMTA for preaward review. Grantees that have not self-certified must submit sole source, single bid, award to other than the low bidder, and "brand name" procurements that exceed 100,000 dollars to UMTA for preaward review. UMTA regional

staffs will make all required reviews. The UMTA Third Party Contract Review Board will continue to function in an advisory capacity to the regional staffs.

Chapter III, paragraph 5d provides that UMTA may require preaward review in other instances on a case-by-case basis. As this circular greatly limits UMTA review of bid protests, this discretion is vital. On occasion, unique situations have arisen where preaward review has prevented significant problems for contractors, grantees, and UMTA. Such situations occur infrequently and UMTA will not exercise this discretion as a matter of course. However, at the discretion of the UMTA Administrator, the Board may be called upon to assume jurisdiction over a particular action, type of action, or all actions within a specified geographic area.

To assist grantees in preparing submissions and in determining the likelihood of approval of the request, Chapter III, paragraph 5 sets forth UMTA's review standards. These standards are not new, but this circular clearly sets them out so that grantees are aware of the criteria UMTA applies in its evaluation of a procurement submission.

- d. UMTA Procurement System Compliance Reviews. The previous version of this circular, 4220.1A, included procurement system compliance reviews as part of the former certification process. Here, Chapter IV revises the compliance review process, setting forth UMTA's broad discretion. The authority for such discretion arises from several sources. One source is OMB Circular A-102, Attachment O, paragraph 4, which encourages Federal agencies to perform procurement system reviews.

The UMT Act also contains provisions that specifically provide extensive review discretion. Section 9(g)(1) states that UMTA, under delegation from the Secretary of the Department of Transportation, shall, at least on an annual basis, conduct or require the grantee to have independently conducted reviews as may be deemed necessary or appropriate by UMTA to determine whether the grantee has complied, among other things, with its Section 9 certifications. Under one certification, Section 9(e)(3)(E), grantees certify that they will use competitive procurements and will not use procurements utilizing exclusionary or discriminatory specifications. Section 9 also authorizes reviews as part of the required triennial review process. (See

UMT Act Section 9(g)(2)). Finally, Section 3(a)(2)(C) prohibits the use of any grant or loan funds to support procurements using exclusionary or discriminatory specifications.

Such discretion is necessary with limited preaward and bid protest review to assure compliance with procurement requirements and standards. The discretion should also assist grantees by reducing UMTA's presence in individual procurements and, where called for, limiting review to a specific issue, thereby minimizing the effort needed for a full-scale compliance review.

- e. Bid protest procedures. UMTA substantially limits its review of bid protests under this circular. In accordance with the Federalism Executive Order, most protest issues are best resolved at the State and local level. Thus, UMTA now only accepts protests alleging that a grantee fails to have written protest procedures or has violated such procedures. Interested parties must have the opportunity to present their concerns to the grantee and grantees must have a formal, written process for considering such concerns. Interested parties that disagree with the grantee's decision then have a formal record with which to proceed to a State or local administrative or judicial authority. If grantees have an appropriate protest process and follow such process, extensive UMTA involvement in bid protests is unnecessary.

In accordance with this reduced UMTA role, the remedy for a grantee's failure to have or follow its protest procedures is simply to require the grantee to do so, if it desires Federal financial assistance for the contract in question. Consistent with the reduced circumstances of UMTA review, the circular also streamlines the review procedure.

- f. Grantee Procurement Requirements and Standards. In addition to the major changes reducing UMTA's involvement in grantee third party procurement, the circular sets forth Federal requirements applicable to such procurements in Chapter I. The paragraph essentially sets forth the procurement provisions of OMB Circular A-102, making several modifications and additions needed to address special characteristics of the UMTA grant program.

Paragraph I-1 delineates the grantee procurements that are subject to the Federal requirements and standards. It clarifies, for grantees receiving operating assistance, that these provisions apply to

all procurements undertaken in support of such operations. It also indicates that the provisions do not apply to procurements relating to capital projects undertaken without UMTA financial assistance.

Paragraph I-2 states that a State grantee will follow the same policies and procedures that it uses for procurements from its non-Federal funds rather than the provisions of the circular. As defined in paragraph 6, "State" refers to the State itself and any agency or instrumentality of the State exclusive of local governments. Regional transit authorities are not State agencies or instrumentalities for purposes of this circular consistent with the definitions of State and local governments in the Common Grant Regulation, 49 CFR Section 18.3. Local governments will administer direct Federal grants in accordance with this Circular and Federal "pass-through" funds, subgranted from the State, according to State laws and procedures.

Paragraph I-3 sets forth procurement standards governing third party procurement. Grantees and subgrantees are free to use their own procedures provided that such procedures are consistent with Federal law, including fundamental principles of procurement as established by the opinions of the Federal Courts and the Comptroller General of the United States.

Several provisions of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURA) are incorporated into the requirements and standards of Chapter I, paragraph 3d states that certain costs associated with leasing of facilities and equipment for use in mass transportation service are eligible capital expenses. This refers to Section 308 of the STURA, as well as UMTA's Capital Cost of Contracting Circular 7010.1.

Paragraph I-5c(5) states that grantees shall use qualifications-based contracting for engineering and design and certain related contracts. This provision mandates the use of qualifications-based contracting procedures for architectural, engineering and a range of related services and implements Section 316 of the STURA.

In accordance with Section 315 of the STURA, paragraph I-5d(1)(e) states that grantees may use sole source procurements (noncompetitive negotiation) for associated capital maintenance items with the original manufacturer or supplier after certifying

that the manufacturer or supplier is the only source for such item and that the price is no higher than that paid by like customers.

Paragraph I-5d(1)(c) states that grantees may undertake noncompetitive negotiation (sole source), when authorized by UMTA. Few such situations arise under this provision; the grantee must clearly evidence that a noncompetitive environment for the particular product or service exists. This requires analysis by the grantee to determine the feasibility of competitive procurement, which the grantee must submit with its request.

The circular adds a new provision on contract options, paragraph I-9. Grantees have often misused or improperly exercised options; guidance will help ensure compliance with Federal requirements as well as fundamental principles of procurement. UMTA has long worked with grantees on an informal basis to ensure that options are not misused. The circular derives its options guidelines from provisions found in the Federal Acquisition Regulation, 48 CFR Subpart 17.2, which governs direct Federal procurement, as well as from agency experience with third party options. The new provision offers guidelines on the use and exercise of options and limits the extent of quantity for supply options and length of time for extension options. Although allowing case-by-case exceptions, the provision limits quantity options to not more than 50% of the initial quantity and limits the total time length of service or supply contracts, including any option period, to five years.

The circular also adds several short provisions that set forth existing, informal UMTA policy. Paragraph I-12 states that UMTA will not participate in advance payments. Paragraph I-13 states that grantees may include progress payment provisions in appropriate circumstances and sets forth criteria for such use. Finally, paragraph I-14 states the appropriate, limited circumstances for the inclusion of liquidated damages provisions.

6. DEFINITIONS. All definitions in the UMT Act are applicable to this circular except as is otherwise provided in this paragraph.
  - a. "Grantee" means the public or private body to which a grant is awarded by UMTA and which is accountable for the use of the funds provided. The grantee is the entire legal entity, even if only a particular component of the entity is designated in the grant award document. For the purposes of this circular,

"grantee" includes any subgrantee of the direct UMTA grantee; therefore, grantees are responsible for assuring that such subgrantees comply with the requirements and standards of this circular and shall ensure that every subgrant includes a provision for compliance with the requirements and standards of this circular, that every subgrant includes any clauses required by Federal statute and implementing regulations, and that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

- b. "Revenue Vehicle" means a bus of any size, commuter rail car or locomotive, heavy rail car, or light rail car, that is designed for mass transportation service. It includes vehicles in which the grantee retains an interest even if the vehicle is not used in every day service.
- c. "State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. "State" does not include a county, municipality, city, town, township, local public authority (which includes any public and Indian housing agency under the United States Housing Act of 1937) school district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity (such as a regional transit authority), or any agency or instrumentality of a local government.
- d. "UMTA" refers to the Urban Mass Transportation Administration.

*Alfred A. DelliBovi*

Alfred A. DelliBovi  
Administrator

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CHAPTER I

GRANTEE PROCUREMENT

1. SCOPE. The requirements and standards set forth in this paragraph apply to all procurement of supplies, equipment, and services for all UMTA assistance programs. For grantees receiving UMTA operating assistance, these requirements and standards apply to all procurements undertaken in support of such grantees' mass transportation operations. These requirements and standards do not apply to procurements undertaken in support of a capital project completely accomplished without UMTA financial assistance.
  
2. STATES. When procuring supplies, equipment, or services under an UMTA grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. States must comply with the requirements of paragraphs I-4a and b Competition. The State will ensure that every purchase order or other contract includes all clauses required by Federal statutes and executive orders and their implementing regulations. States shall also follow state law and procedures when awarding and administering subgrants to local governments. In such instances, States shall ensure that every subgrant includes any clauses required by Federal statutes and implementing regulations and that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

Other grantees and subgrantees, but not including subgrantees of a State, will comply with the requirements and standards of this circular. Subgrantees shall comply with requirements and standards applicable to grantees. Subgrantees of a State will comply with State law and procedures.

3. PROCUREMENT STANDARDS. The following standards are applicable to UMTA third party procurements:
  - a. Grantees and subgrantees will use their own procurement procedures that reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law, including the requirements and standards identified in this paragraph.

- b. Grantees will maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- c. Grantees will assure that ethical conduct is maintained by adhering to the following requirements:
  - (1) Grantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer, or agent of the grantee shall participate in the selection, or in the award or administration of a contract supported by UMTA funds, if a conflict of interest real or apparent would be involved. Such a conflict would arise when:
    - (a) The employee, officer, or agent,
    - (b) Any member of his immediate family,
    - (c) His or her partner, or
    - (d) An organization that employs, or is about to employ, any of the above,has a financial or other interest in the firm selected for award.
  - (2) The grantee's officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.
  - (3) The written policy shall include procedures for identifying and preventing real and apparent organizational conflicts of interests. An organizational conflict of interest exists when the nature of the work to be performed under a

proposed contract may, without some restriction on future activities, result in an unfair competitive advantage to the contractor or impair the contractor's objectivity in performing the contract work.

- d. Grantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach. Certain costs associated with leasing of facilities and equipment for use in mass transportation service are eligible capital expenses. See UMTA Circular 7010.1, Capital Cost of Contracting.
- e. To foster greater economy and efficiency, grantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services. The requirements and standards of this circular apply to procurements entered into under such agreements using UMTA funds.
- f. Grantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property, whenever such use is feasible and reduces project costs.
- g. Grantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost.
- h. Grantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- i. Grantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor

selection or rejection, and the basis for the contract price.

- j. Grantees will use time and material type contracts only:
  - (1) After a determination that no other type contract is suitable; and
  - (2) If the contract includes a ceiling price that the contractor exceeds at its own risk.
  
- k. Grantees alone will be responsible in accordance with good administrative practice and sound business judgment for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee of any contractual responsibility under its contracts. UMTA will not substitute its judgment for that of the grantee or subgrantee, unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction. Nonetheless, regarding claims, UMTA does have an interest in such claims and will only participate in funding certain claims and in accordance with UMTA procedures. See UMTA Circular 5010.1A, Urban Mass Transportation Project Management Guidelines for Grantees, Chapter I, pages 24 through 26.
  
- l. Grantees will have written procedures to handle and resolve protests relating to their procurements and shall, in all instances upon UMTA request, disclose information regarding a protest to UMTA. A protestor must exhaust all administrative remedies available through the grantee's dispute resolution mechanism before UMTA will consider a protest. Chapter V describes the limited circumstances in which UMTA will review a protest and the procedure for such protests.
  
- 4. COMPETITION. The following requirements for competition are applicable to UMTA third party procurements:
  - a. All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of paragraph 3. Some of the situations considered to be restrictive of competition include, but are not limited to:

- (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
  - (2) Requiring unnecessary experience and excessive bonding;
  - (3) Noncompetitive pricing practices between firms or between affiliated companies;
  - (4) Noncompetitive awards to professionals and other consultants that are on retainer contracts;
  - (5) Organizational conflicts of interest (see paragraph 3c above);
  - (6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other salient characteristics of the brand name product; and
  - (7) Any arbitrary action in the procurement process.
- b. Grantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not preempt State licensing laws. When employing the qualifications-based method for contracting for architectural and engineering services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- c. Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:
- (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material product or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications

should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used. A grantee shall use a "brand name or equal" description only when it could not provide an adequate specification or more detailed description, other than by inspection and analysis, in time for the acquisition under consideration. Further, a grantee wishing to use "brand name or equal" must carefully identify its minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation; and

- (2) Identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- d. Grantees will ensure that all prequalified lists of persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees will not preclude potential bidders from qualifying during the solicitation period.
5. METHODS OF PROCUREMENT. The following methods of procurement may be used, as appropriate:
- a. Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than \$25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.
  - b. Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in this subparagraph apply.
    - (1) In order for sealed bidding to be feasible, the following conditions should be present:

- (a) A complete, adequate, and realistic specification or purchase description is available;
  - (b) Two or more responsible bidders are willing and able to compete effectively for the business;
  - (c) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price; and
- (2) If sealed bids are used, the following requirements apply:
- (a) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;
  - (b) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services sought in order for the bidder to properly respond;
  - (c) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
  - (d) A fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
  - (e) Any or all bids may be rejected if there is a sound documented business reason.
- c. Procurement by competitive proposal. The technique of competitive proposal is normally conducted with more than one source submitting a proposal, and either a fixed price or cost reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed

bids. If this method is used the following requirements apply:

- (1) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
- (2) Proposals will be solicited from an adequate number of qualified sources;
- (3) Grantees will have a written procedure for conducting technical evaluation of the proposals received and for selecting awardees. If so stated in the Request For Proposals, grantees may make selection on the basis of original proposals, without negotiation with any offeror. If a grantee conducts negotiations at all, however, it must then negotiate with all offerors in the competitive range, i.e., all offerors that it determines have a reasonable chance of being selected for award based on cost or price and other factors that were stated in the solicitation;
- (4) Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered; and
- (5) Grantees shall use competitive proposal procedures for qualifications-based procurement of architectural and engineering services. Grantees shall also use qualifications-based procurement for architectural and engineering related services such as program management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping, or related services. Following this method, competitors' qualifications are evaluated and the most qualified competitor is selected subject to negotiation of fair and reasonable compensation. Under this method, a grantee may not consider price as an evaluation factor in determining the most qualified offeror. Negotiation is conducted with only the most qualified offeror. This method, where price cannot be used as an evaluation factor and negotiations are conducted with only the most qualified offeror, can only be used in procurement of the above services. This method of procurement cannot be used to obtain other types of services even though a firm that

provides the above types of services are also potential sources to perform other services. This subparagraph applies except to the extent any State adopts or has adopted by statute a formal procedure for the procurement of architectural and engineering services.

- (6) Grantees may use competitive proposal procedures for the purchase of rolling stock.

d. Procurement by noncompetitive negotiation (sole source). Sole source procurement is accomplished through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. A contract amendment or change order that is not within the scope of the original contract is a noncompetitive negotiation that must comply with this subparagraph.

- (1) Procurement by noncompetitive negotiation may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposal and at least one of the following circumstances applies:
- (a) The item is available only from a single source;
  - (b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
  - (c) UMTA authorizes noncompetitive negotiations;
  - (d) After solicitation of a number of sources, competition is determined inadequate; or
  - (e) The item is an associated capital maintenance item as defined in Section 9(j) of the UMT Act that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to UMTA: (1) that such manufacturer or supplier is the only source for such item; and (2) that the price of such item is no higher than the price paid for such item by like customers.
- (2) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the

evaluation of the specific elements of costs and profit, is required. Also see Chapter III.

- (3) Grantees are required to submit certain proposed procurements by noncompetitive negotiation to UMTA for preaward review in accordance with Chapter III.

6. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN BUSINESS ENTERPRISES, AND LABOR SURPLUS AREA FIRMS.

- a. The grantee will take all necessary affirmative steps to assure that minority firms, women business enterprises, and labor surplus area firms are used when possible.
- b. Affirmative steps shall include:
  - (1) Placing qualified small and minority businesses and women business enterprises on solicitation lists;
  - (2) Assuring that small and minority businesses and women business enterprises are solicited whenever they are potential sources;
  - (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business and women business enterprises;
  - (4) Establishing delivery schedules, where the requirement permits, that encourage participation by small and minority business and women's business enterprises;
  - (5) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
  - (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in subparagraphs (1) through (5), above.
- c. Section 19 of the UMT Act, Section 105(f) of the Surface Transportation Assistance Act of 1982, section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, and DOT implementing regulations at 49 CFR Part 23 impose additional requirements for the participation of disadvantaged business enterprises (DBEs) in UMTA programs.

7. CONTRACT COST AND PRICE.

- a. Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional consulting and architectural and engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.
  - b. Grantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to such things as the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates for similar work.
  - c. Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. Grantees may reference their own cost principles that comply with the applicable Federal cost principles.
  - d. The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.
8. BONDING REQUIREMENTS. For those construction or facility improvement contracts or subcontracts exceeding \$100,000, UMTA may accept the bonding policy and requirements of the grantee, provided that UMTA determines that its interest is adequately protected.

- a. If UMTA has not made such a determination, the minimum requirements for construction contracts shall be as follows:
- (1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified;
  - (2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract; and
  - (3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract.
- b. For nonconstruction contracts, UMTA discourages performance bonding requirements except where applicable law or regulation provides for such bonding and the grantee determines that such a requirement is necessary and documents its procurement records regarding such necessity.

9. OPTIONS.

a. Definition.

An option means a unilateral right in a contract by which, for a specified time, a grantee may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.

b. Use of options.

- (1) Subject to the limitations of this subparagraph, grantees may include options in contracts in certain circumstances as detailed below.

(2) A grantee shall not employ options if:

- (a) The foreseeable requirements involve minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price) and delivery requirements far enough into the future to permit competitive acquisition, production, and delivery;
  - (b) The supplies or services are readily available on the open market;
  - (c) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;
  - (d) An indefinite quantity or requirements contract is appropriate (except that the grantee may use options for extending the term of such contracts);
  - (e) Market prices for the supplies or services involved are likely to change substantially; or
  - (f) The option represents known firm requirements for which funds are available.
- (3) In recognition of (a) grantees' needs in certain service contracts for continuity of operations and (b) the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period and competition is infeasible.

c. Contracts.

- (1) The contract shall limit option quantities for additional equipment and supplies to not more than 50 percent of the initial quantity of the same contract line item.
- (2) The total of the basic and option periods shall not exceed five years in the case of services and requirements contracts.
- (3) Prior to issuing a solicitation, a grantee must obtain UMTA approval for the inclusion of an

option provision in excess of the amounts or periods set forth in paragraphs 9c(1) and (2), above. The request to UMTA must explain the need for the option and why it is in the best interest of the grantee and UMTA.

d. Exercise of Options.

- (1) A grantee may exercise an option only after making a written determination, signed by the appropriate official and placed in the contract file, that the exercise of the option is the most advantageous method of fulfilling the grantee's need, considering price and other factors.
- (2) A grantee, after considering price and other factors, shall make the determination on the basis of one of the following:
  - (a) A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. If it is anticipated that the best price available is the option price or that this is the more advantageous offer, the grantee should not use this method of testing the market;
  - (b) An analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer; or
  - (c) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. The grantee shall take into consideration such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services.
- (3) The determination of other factors under paragraph 9d(2) should take into account the grantee's need for continuity of operations and potential costs of disrupting operations.
- (4) Before exercising an option, the grantee shall determine that such action is in accordance with the terms of the option, the requirements of

this paragraph, and the provisions of this circular.

10. CARGO PREFERENCE. 46 U.S.C. 1241(b)(1) and 46 CFR Part 381 impose cargo preference requirements on the shipment of foreign made goods.
11. BUY AMERICA. Section 165 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. 1601, section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, and 49 CFR Parts 660 and 661 impose Buy America provisions on the procurement of foreign products and materials.
12. ADVANCE PAYMENTS. UMTA does not authorize and will not participate in funding payments made by a grantee to a contractor prior to the incurrence of costs by the contractor.
13. PROGRESS PAYMENTS PROVISIONS. The following standards apply to the use of progress payments:
  - a. In appropriate circumstances, grantees may include a clause providing for payments by the grantee to the contractor, prior to delivery or completion, that are determined on the basis of costs incurred by the contractor and the percentage or stage of completion of the contract;
  - b. Grantees shall only use a Progress Payments clause in accordance with the following criteria:
    - (1) Progress payments may be appropriate if:
      - (a) the contractor will not be able to bill for the first delivery of products, or other performance milestones, for a substantial time after work must begin (normally four months or more for small business concerns, six months or more for others), and
      - (b) the contractor will make expenditures for contract performance during the period prior to delivery that have a significant impact on the contractor's working capital.
    - (2) Progress payments may also be appropriate (particularly for small businesses), if the contractor demonstrates actual financial need or the unavailability of private financing;
    - (3) Progress payments normally are not appropriate for contracts of less than \$1,000,000 (except for small businesses or if the contractor will perform several small contracts at the same time

with a total impact on working capital equivalent to a single contract of \$1,000,000 or more); and

- (4) Grantees should not provide for progress payments, if the contract items are quick turnover types for which progress payments are not customary commercial practice.

- c. When progress payments are used, the grantee must obtain title to property (materials, work in progress, and finished goods) for which progress payments are made. Such title must be free of all encumbrances or the grantee must obtain a priority lien secured pursuant to Article 9 of the Uniform Commercial Code and other applicable State laws or local ordinances. To the extent grant funds are expended through progress payments, the rights of the United States in property for which the progress payments were made must be paramount to any rights arising under State law.

14. LIQUIDATED DAMAGES PROVISIONS.

- a. Grantees shall determine whether or not use of a liquidated damages provision is appropriate for each specific procurement. The amount of liquidated damages must be reasonable to compensate the grantee for possible damages and not be so large as to be construed as a penalty. Grantees should not include such provisions in a contract unless:

- (1) the time of delivery is of such importance that the grantee can reasonably expect to suffer damage if the delivery is delinquent;
- (2) the grantee determines that the delivery schedule is reasonable at the time of award; and
- (3) damages would be difficult or impossible to establish.

- b. If a grantee determines that a liquidated damages clause is necessary in a contract, it shall document the derivation of the rate of assessment and ensure it is reasonable, proper, and not arbitrary.

15. STATUTORY AND REGULATORY REQUIREMENTS. Related Federal requirements applicable to the UMTA program are set forth at Attachment A, of this circular.

CHAPTER II

GRANTEE SELF-CERTIFICATION

1. APPLICABILITY.

- a. Within one year of the effective date of this circular, all grantees operating mass transit systems that possess, own, and/or operate a total of over 100 revenue vehicles, not including vans, shall file with the appropriate UMTA Regional Office a self-certification that its procurement system and procedures comply with the Federal requirements and standards set forth in this circular. All grantees operating transit systems of 100 revenue vehicles or less may file such a self-certification at any time with the applicable Regional Office. The self-certification form is set forth at Attachment B, of this circular.
- b. In conjunction with Chapter I, paragraph 2, above, State grantees of any size need not follow the self-certification process described below, but must submit a simple one-time assurance to UMTA that the State grantee will include in contracts any clauses required by Federal statutes and executive orders and their implementing regulations.

2. EFFECT. The act of self-certification shall limit mandatory UMTA preaward review of certain procurements, as described in Chapter III. Such self-certification is effective for three years from the date received by UMTA.

3. REQUIRED PROCESS.

- a. Prior to submitting a self-certification, each grantee shall review its procurement system to ensure that it fully complies with the requirements and standards of this circular as well as applicable State and local laws and regulations that are not preempted by Federal requirements.
- b. The grantee shall include a copy of its procurement protest procedures with its self-certification.
- c. The grantee shall complete the self-certification form set forth at Attachment B of this circular.
- d. The authorized representative of the grantee shall sign the self-certification form and transmit it to the appropriate Regional Office.

CHAPTER III

UMTA PREAWARD REVIEW OF THIRD PARTY CONTRACTS

1. SPECIFICATIONS REVIEW. Grantees must make available, upon UMTA's request, technical specifications on proposed procurements where UMTA believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee desires to have the review accomplished after a solicitation has been developed, UMTA may still review the specifications with such review usually limited to the technical aspects of the proposed purchase.
2. SUBMISSION OF CONTRACTS. Contracts for which grantees must submit documentation required in paragraph 4, below, to UMTA for preaward review.
  - a. Grantees that have self-certified under Chapter II shall submit to UMTA the required documentation for all procurements by noncompetitive negotiation (sole source), as described in Chapter I, paragraph 5d, that exceed one million dollars and procurements of 14 or more buses, including the base amount and any option amounts, in which a single bid or offer is received.
  - b. Grantees that have not self-certified under Chapter II shall submit the required documentation for the following types of procurements that exceed one hundred thousand dollars:
    - (1) Procurement by noncompetitive negotiation (sole source), as described in Chapter I, paragraph 5d above;
    - (2) Procurements in which a single bid or offer is received;
    - (3) Procurements that the grantee proposes to award to other than the apparent low bidder; and
    - (4) Procurements that specify a "brand name" product.
  - c. UMTA may require a grantee to submit the documentation listed in paragraph 4 below, for any specific procurement in addition to those listed above when such submission is in the interest of the agency. Such situations might arise from a grantee's request, an outside party's request that raises an issue of interest to UMTA, or in other instances.

Such reviews normally will take place prior to award, but may take place at any time.

3. TIMING. For procurements requiring UMTA preaward review, grantees shall submit the documentation listed below to the appropriate UMTA Regional Office. A grantee submits this information to UMTA after the grantee determines to whom it proposes to award the contract. With a "brand name" solicitation, paragraph 2b(4), above, grantees should submit the required information prior to solicitation. Similarly, grantees should consider early submission of information to UMTA for large or potentially controversial noncompetitive negotiations.
4. REQUIRED DOCUMENTATION.
  - a. For noncompetitive negotiations, a grantee shall submit a justification statement that:
    - (1) explains the requirement including details about the unique features that result in only one source existing that is capable of meeting the need;
    - (2) describes the alternatives that the grantee considered (i.e., a market survey) and why each alternative was rejected;
    - (3) explains the selected contractor's unique capability that results in it being the only available source;
    - (4) describe the actions the grantee is taking to ensure that future procurements for like or similar supplies, equipment, or services will be competitive; and
    - (5) states that the price is fair and reasonable and provides a basis for that determination (i.e., a cost or price analysis and if appropriate, a negotiation memorandum).
  - b. For a single bid or offer, the grantee shall submit the following documentation:
    - (1) a statement that the grantee has analyzed the specification and concludes that there are no items in the solicitation that inhibit or eliminate competition or, if the analysis shows that the solicitation contains a restrictive item, a justification that the grantee needs the item to meet the grantee's minimum needs;

- (2) evidence of the grantee's request of all vendors that were expected to compete to submit their reasons for not competing and the vendors' responses thereto; and
    - (3) a statement that the price is fair and reasonable and the basis for that determination (i.e., a cost or price analysis).
  - c. For proposed award to other than the low bidder, the grantee shall submit the following:
    - (1) a detailed explanation of why the apparent low bidder is not responsive or responsible;
    - (2) an assurance that the proposed awardee is responsive to all aspects of the solicitation and is responsible;
    - (3) a statement that the price is fair and reasonable and the basis for that determination (i.e. a cost or price analysis); and
    - (4) the written decision or disposition of any protest that the grantee received.
  - d. For procurements that specify a "brand name or equal" product, the grantee shall submit the following:
    - (1) the relevant portion of the specification;
    - (2) a description of why the grantee could not feasibly make available an adequate specification or more detailed description by a means other than inspection and analysis in time for the acquisition under consideration; and
    - (3) a statement of the grantee's minimum needs for the item and the salient physical and functional characteristics of the item.
5. UMTA REVIEW OF GRANTEE SUBMISSIONS. UMTA will make the following determinations in reviewing noncompetitive proposals:
  - a. UMTA will determine whether the grantee submitted the documentation required in paragraph 4, above.
  - b. UMTA will determine whether the grantee adequately justifies the contract action. UMTA's review varies dependent upon the type of contract in question:
    - (1) For noncompetitive negotiation, this review examines whether the contract action rightfully

falls within the limited circumstances listed in Chapter I, paragraph 5d(1), and whether the procurement could be competitively bid so as to meet the minimum requirements of the grantee at the lowest cost. It is not sufficient for the grantee to merely conclude that a certain source is uniquely qualified or is the only company that can meet a certain delivery requirement; the grantee must include specifics and details regarding how the source is solely qualified (mere preferability or desirability is not sufficient). General conclusions and statements as to capability, experience, personal know-how, are not acceptable. The grantee must demonstrate that another product of some different character that could be obtained competitively could not satisfy the grantee's minimum requirements. If the grantee claims that time requirements necessitate the sole source, it must demonstrate that the delivery schedule is critical and specifically detail the damage that would occur if the delivery schedule provided for competition. A mere statement of a deadline is not sufficient justification;

- (2) For single bid award, UMTA will review whether the grantee adequately contacted possible bidders or advertised the requirement, whether the specification is unacceptably restrictive, as well as review statements of other potential bidders as to why they failed to bid;
- (3) For award to other than the low bidder, this review focuses on the grantee's rationale for eliminating a lower bidder or bidders from consideration; and
- (4) For procurements that specify a "brand name or equal," UMTA will determine whether the grantee could not feasibly make available an adequate specification or more detailed description by a means other than inspection and analysis in time for the acquisition under consideration. Further, UMTA will determine whether the grantee carefully identified its minimum needs and clearly set forth those salient physical and functional characteristics in the solicitation.

- c. UMTA will determine whether the grantee had a reasonable basis for determining that the contract price is fair and reasonable and is adequately supported by price or cost analyses and a negotiation memorandum as appropriate.

- d. UMTA reviews will normally be conducted by UMTA regional staff with advice and assistance of headquarters staff, including the UMTA Third Party Contract Review Board. At the discretion of the UMTA Administrator, the Third Party Contract Review Board may take jurisdiction over a particular action, category of action, or all actions within a specified geographic area.
6. UMTA DECISION. On the basis of its review, UMTA may concur in or deny the grantee's proposal to award to a specific bidder. In situations where UMTA reviews a grantee's earlier award of a contract, UMTA may concur with the grantee's selection or refuse to participate in funding the contract. UMTA may take such other action as is appropriate based on its findings.
7. LIMITS OF UMTA REVIEW. To expedite the review process, UMTA may only make a determination on the central issue requiring preaward review (although in its discretion, UMTA may review any or all compliance issues). Since UMTA does not review for compliance with all applicable requirements, grantees or other parties cannot rely on UMTA approval of a noncompetitive negotiation, single bid, award to other than the low bidder, or brand name as evidencing that the procurement complies with any other Federal law or procurement requirement or standard.

CHAPTER IV

UMTA PROCUREMENT SYSTEM COMPLIANCE REVIEWS

1. UMTA DISCRETION. In the agency's discretion, UMTA may undertake a procurement system compliance review, as described in this paragraph, of any UMTA grantee at any time. Such review may be initiated on the basis of specific information regarding a possible deficiency in the grantee's procurement system, or purely on a random selection basis. UMTA may conduct as broad or limited a compliance review as it determines is necessary to assure compliance with this circular. Further, UMTA may conduct compliance reviews as often as the agency determines is necessary, but normally will not conduct a second review of the same grantee relating to the same issues, other than a follow up, related review, within 24 months of a previous review.
2. SCOPE. A procurement system compliance review is designed to determine whether or not a grantee complies with the procurement requirements and standards of this circular. UMTA may conduct procurement system compliance reviews by requesting a grantee to submit specific documentation and/or by onsite review of a grantee.
3. DETERMINATIONS. If UMTA determines that a grantee does not comply with the procurement requirements and standards of this circular, UMTA may take such remedial action as the agency deems necessary. Dependent on the nature of the noncompliance, such action could include, but is not limited to, the following:
  - a. Require specific actions by the grantee in order to bring its procurement system into compliance with this circular;
  - b. Require a grantee to submit all proposed contracts or particular categories of contracts to UMTA for preaward review;
  - c. Refuse to participate in funding all or portions of a specific contract or contracts that a grantee entered into through a procurement or procurements that did not comply with the requirements and standards of Chapter I; and
  - d. Refuse to award further grants until the detailed problems are remedied.

CHAPTER V

BID PROTESTS

1. UMTA REVIEW OF PROTESTS.

- a. UMTA will only review protests regarding the alleged failure of the grantee to have written protest procedures or alleged failure to follow such procedures.
- b. Alleged violations on other grounds are under the jurisdiction of the appropriate State or local administrative or judicial authorities. Alleged violations of a specific Federal requirement that provides an applicable complaint procedure shall be submitted and processed in accordance with that Federal regulation. See, e.g., Buy America Requirements, 49 CFR Part 661 (Section 661.15); Participation by Minority Business Enterprise in Department of Transportation Programs, 49 CFR Section 23.73.
- c. UMTA will only review protests submitted by an interested party as defined in paragraph 3, below.

2. REMEDY. UMTA's remedy for a grantee's failure to have written protest procedures or failure to follow such procedure is limited to requiring the grantee to develop such procedures, if necessary, and follow such procedures in reviewing the protest at issue, if the grantee desires UMTA financial participation in the contract in question. In instances where a grantee has awarded to another bidder or offeror prior to UMTA's decision on the protest, UMTA may refuse to participate in funding the contract.

3. DEFINITIONS. For the purposes of this Chapter, the following definitions apply:

- a. "Days" refers to working days of the Federal Government.
- b. "File" or "submit" refers to the date of receipt by UMTA.
- c. "Interested party" means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.
- d. "Bid" includes the term "offer" or "proposal" as used in the context of negotiated procurements.

4. TIME FOR FILING.

- a. Protestors shall file a protest with UMTA not later than five days after a final decision is rendered under the grantee's protest procedure. In instances where the protestor alleges that the grantee failed to make a final determination on the protest, protestors shall file a protest with UMTA not later than five days after the protestor knew or should have known of the grantee's failure to render a final determination on the protest.
- b. Grantees shall not award a contract for five days following its decision on a bid protest except in accordance with the provisions and limitations of subparagraph h. After five days, the grantee shall confirm with UMTA that UMTA has not received a protest on the contract in question.

5. SUBMISSION OF PROTEST TO UMTA.

- a. Protests should be filed with the appropriate UMTA Regional Office with a concurrent copy to the grantee.
- b. The protest filed with UMTA shall:
  - (1) Include the name and address of the protestor.
  - (2) Identify the grantee, project number, and the number of the contract solicitation.
  - (3) Contain a statement of the grounds for protest and any supporting documentation. This should detail the alleged failure to follow protest procedures or the alleged failure to have procedures and be fully supported to the extent possible.
  - (4) Include a copy of the local protest filed with the grantee and a copy of the grantee's decision, if any.

6. GRANTEE RESPONSE.

- a. UMTA shall notify the grantee in a timely manner of the receipt of a protest. UMTA shall instruct the grantee to notify the contractor of the protest if award has been made or, if no award has been made, to notify all interested parties. The grantee shall instruct all who receive such notice that they may communicate further directly with UMTA.

- b. The grantee shall submit the following information not later than ten days after receipt of notification by UMTA of the protest:
    - (1) a copy of the grantee's protest procedure;
    - (2) a description of the process followed concerning the protestor's protest; and
    - (3) any supporting documentation.
  - c. The grantee shall provide the protestor with a copy of the above submission.
7. PROTESTOR COMMENTS. The protestor must submit any comments on the grantee's submission not later than ten days after the protestor's receipt of the grantee's submission.
8. WITHHOLDING OF AWARD. When a protest has been timely filed with the grantee before award, the grantee shall not make an award prior to five days after the resolution of the protest, or if a protest has been filed with UMTA, during the pendency of that protest, unless the grantee determines that:
- a. The items to be procured are urgently required;
  - b. Delivery or performance will be unduly delayed by failure to make the award promptly; or
  - c. Failure to make prompt award will otherwise cause undue harm to the grantee or the Federal Government.

In the event that the grantee determines that the award is to be made during the five day period following the local protest decision or the pendency of a protest, the grantee shall notify UMTA prior to making such award. UMTA will not review the sufficiency of the grantee's determination to award during the pendency of a protest prior to UMTA's bid protest decision. UMTA reserves the right not to participate in the funding of any contract awarded during the pendency of a protest.

9. UMTA ACTION. Upon receipt of the submissions, UMTA will either request further information or a conference among the parties, or will render a decision on the protest.

ATTACHMENT A

STATUTORY AND REGULATORY REQUIREMENTS APPLICABLE TO URBAN MASS  
TRANSPORTATION ADMINISTRATION THIRD PARTY PROCUREMENT

STATUTES

- 1) Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. 1601 et. seq.
- a) Sec. 3(a)(2)(C) Prohibition against use of UMTA grant and loan funds to support exclusionary and discriminatory specifications.
- b) Sec. 12(b)(1) Audit requirements for contracts entered into by other than competitive bidding procedures. Unlike Section 14.h. of Attachment O, Section 12(b)(1) does not exempt small purchases from this requirement.
- c) Sec. 12(b)(2) Authorizes use of competitive procurement process in rolling stock procurements in lieu of consideration of performance standardization, and life cycle costs.
- d) Sec. 12(b)(4) Requirements for procurement of Architect/Engineer and related Services.
- e) Sec. 12(g) Secretary is required to honor requests by grantees in establishing bus seat specifications.
- f) Sec. 13(a) Applies Davis-Bacon Act requirements to UMTA grants. Thus, Department of Labor regulations are applicable as provided in Section 14e of Attachment O.
- g) Sec. 19 Authorizes the Secretary to take affirmative action to assure non-discrimination in employment and business opportunities arising out of UMTA-funded activities.
- 2) Surface Transportation Assistance Act of 1982, as amended by Sections 337 of the Surface Transportation and Uniform Relocation Act of 1987, Pub.L. 100-17, April 2, 1987. Establishes domestic preference requirements on UMTA-assisted procurements.
- 3) Surface Transportation and Uniform Relocation Act of 1987, Pub.L. 100-17, 106(c), April 2, 1987. Requirements for participation of disadvantaged business enterprises.
- 4) 41 USC § 22 No member of or delegate to Congress shall be admitted to any share or part of such contract or to any benefit arising thereunder.

- 5) 41 USC § 254(a) Covenant against payment of contingent fees.
- 6) 18 USC § 1001, 31 USC § 231, 3801, 49 USC § 1607(h) False or fraudulent statements/claims.

REGULATIONS

- 1) 49 CFR Part 18. Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
- 2) 49 CFR Part 661. Buy America - Implements Section 401 of the Surface Transportation Assistance Act of 1982. Grants a preference to domestic products.
- 3) 49 CFR Part 27. Elderly and Handicapped - Implements Section 504 of the Rehabilitation Act of 1973. Requires that vehicles and facilities be accessible.
- 4) 41 CFR § 101-19.6. Accommodations for Physically Handicapped. GSA specifications on construction design.
- 5) 29 CFR Part 1926. Safety Standards - Implements Section 107 of the Contract Work Hour and Safety Standards Act. No laborer or mechanic shall be required to work in unsafe surroundings.
- 6) 49 CFR Part 23. Disadvantaged Business Enterprise.
- 7) 49 CFR Part 21. Equal Employment Opportunity.
- 8) 49 CFR Part 29. Suspension and Debarment.
- 9) 40 CFR Part 249. Use of Fly Ash in Procurement of Cement and Concrete.
- 10) 46 CFR Part 381. Cargo Preference - Use of U.S. Flag Vessels. Require the shipment of at least 50% of value of the gross tonnage in U.S. ships.
- 11) 49 CFR Part 500. Motor Vehicle Safety Standards require delivery of safe vehicles.
- 12) 40 CFR Parts 84 and 85. Motor Vehicle Pollution Requirements set emission standards for vehicles.
- 13) 40 CFR Part 15. Prohibits the use of facilities included on the EPA list of violating facilities for contracts exceeding \$100,000.





6. Summary of method for conducting technical evaluation of proposals and selection, if a grantee uses the competitive proposal method of procurement.

7. Summary of bonding policy and requirements (or a statement that the grantee uses the minimum requirements set forth in Chapter I paragraph 8, C 4220.1B).

D. Grantee has attached a copy of its full bid protest procedure.

E. Grantee's Certification:

I, as the authorized official of the grantee listed above, hereby certify that \_\_\_\_\_ (grantee's name) \_\_\_\_\_ meets all the requirements of UMTA Circular 4220.1B.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

ATTEST: \_\_\_\_\_ By: \_\_\_\_\_

\_\_\_\_\_  
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